Supreme Court, U.S.
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No. 95-1889

In The

# Supreme Court of the United States

October Term, 1995

BECHTEL ENERGY CORPORATION,

*Petitioner,*

v.

ROBERT B. REICH, Secretary of Labor,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITIONER'S REPLY BRIEF IN SUPPORT

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## QUESTION PRESENTED

In a case brought pursuant to the employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. section 5851, in which

> (1) the complainant and respondent agreed to settle;
>
> (2) the respondent, expecting the Secretary of Labor would approve and join in the settlement as required by the Energy Reorganization Act, paid the complainant the settlement money; and
>
> (3) the Secretary of Labor instead rejected the settlement agreement;

does the collateral order doctrine apply to allow appeal from the Secretary of Labor's decision that he lacks the fundamental adjudicatory powers to bar complainant from proceeding if the complainant does not return the settlement money?

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## INTRODUCTION

Respondent raises two main points in opposition to the grant of certiorari: that petitioner's position on the merits is, in any event, wrong, and even if it weren't wrong, this precise factuai situation is unlikely to recur. This reply brief focuses on explaining why the recurrence argument is faulty. It also includes a short discussion about why respondent's cursory argument attempting to refute the merits of petitioner's position simply raises more questions and underscores their significance.

## ARGUMENT

### A. Respondent's Recurrence Argument Fails to Recognize That The General Principles Contained in This Fact Situation Are Unresolved and Likely to Recur.

Respondent argues that it is now settled law that "the Secretary may not sever objectionable provisions of a settlement agreement" and that "administrative complaints will not be dismissed based on settlements to which the Secretary does not consent" and therefore "no prudent employer will make payment under a settlement agreement until after the Secretary has approved the entire agreement." From this Respondent concludes that "these issues are not ones of an important or recurring nature. . . . " Even assuming that this precise factual situation is unlikely to arise again, future cases involving the broader legal issues presented in this case – (1) appealability and (2) the nature and extent of the Secretary's adjudicatory powers – are virtually inevitable.

**1. Appealability**

As for the threshold question of appealability, this case presents at least two aspects of the collateral order doctrine which is likely to recur and merits clarification by this Court. One aspect is whether the type of interest at stake is vindicable absent immediate appeal. The other aspect of the collateral order doctrine – the importance of the question involved – is intertwined with the underlying issue on the merits: the nature and extent of the Secretary's adjudicatory powers. This second aspect will be discussed in the following section.

The answer to whether or not the interest at stake is vindicable without immediate appeal turns on whether the facts of this case more closely resemble *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992 (1994) or *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545, 546 (1949). As argued in the Petition, this case resembles *Digital* superficially, but in substance is practically the same as *Cohen* (holding that the collateral order doctrine applies to an order that a plaintiff need not post a bond to proceed). However, the Secretary and the Fifth Circuit have grouped this case with *Digital*, despite the fact that it is indistinguishable from *Cohen* with respect to the critical issue: must the plaintiff pay (or return) money in order to proceed.

Undoubtedly cases presenting the question of when a plaintiff must pay (or return) money in order to proceed will arise in the future; moreover, some of those cases will present the issue of whether a determination by the tribunal of first instance that the plaintiff needn't pay is appealable pursuant to the collateral appeal doctrine.

This Court should grant certiorari in order to draw the line between *Cohen*-type and *Digital*-type cases more precisely.[1]

**2. Nature and Extent of the Secretary's Adjudicatory Powers.**

Should certiorari be denied, the other question which would be left unaddressed by both this Court and the federal judiciary is the nature and extent of the Secretary's adjudicatory powers. As mentioned above, this issue also affects the analysis of one of the requirements of the collateral order doctrine: the presence of a sufficiently important question.[2] Once again, *Digital* does not control this case. *Digital* involved an attempt to enforce a settlement agreement through an interlocutory appeal, the interpretation of which would require the resolution of factual issues intertwined with the entire case on the merits. The case *sub judice* involves a completely collateral and *a priori* issue about the Secretary's powers to

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[1] Bechtel, of course, maintains that this case is like *Cohen*, not *Digital*, and so is not asking (in the first instance) that *Digital* should be overturned. However, in the alternative, if the case *sub judice* is determined to fall within the purview of *Digital*, Bechtel would urge that *Digital* be overturned to the extent necessary to protect a litigant's right to fairness in the proceedings. Indeed, if this Court deemed the case at bar to fall within the scope of *Digital*, some explanation or guidance as to how *Digital* and *Cohen* can be read together would be in order.

[2] This Court has recently reconfirmed the independent requirement of "importance," *see Digital*, 114 S.Ct. at 2001 and it is this requirement which necessitated a detailed overview in the petition of Bechtel's argument on the merits.

ensure a fair trial for Petitioner.[3] As explained in the Petition, the resolution of this question requires analysis and interpretation of the source of the Secretary's fundamental adjudicatory powers. For example, does the Administrative Procedures Act, federal common law, and/or a tribunal's "inherent powers to manage litigation" apply to safeguard the fairness of the proceedings?

Future cases such as this one questioning the fundamental bases of administrative agencies' adjudicatory powers are virtually inevitable. However, absent appeal pursuant to the collateral order doctrine, it is unlikely that the federal judiciary, let alone this Court, will ever have an opportunity to clarify these issues.

**B. Respondent's Cursory Attempt To Refute The Merits of Bechtel's Position Simply Raises More Questions and Underscores Their Significance.**

Respondent's brief, by virtue of its attempt to peremptorily dispose of petitioner's position on the merits, actually underscores the presence of important and disputed questions which should be heard by this Court. Indeed, in several instances, Respondent's brief fails to grasp (or, at the least, acknowledge) the actual points which Bechtel is asserting.

For example, Respondent mischaracterizes Bechtel's argument as asserting a "right not to stand trial" (Resp. 9)

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[3] Despite the Respondent's efforts to the contrary, the case at bar does not hinge on, or even really concern, the terms and details of the settlement agreement. Rather, it concerns threshold questions of law about the Secretary's powers.

when Bechtel is attempting to vindicate a right to fairness in the proceedings. It is tautologous that every right to a fair trial is also a right not to be subjected to an unfair trial, and it merely obfuscates the issue to state it as the "right not to stand trial." Bechtel is not asserting that it has an absolute right not to stand trial, but rather that it has a right to a fair trial. Nor is it asserting that its right is based on an "agreement"; to the contrary, regardless of any agreement, it is still, nevertheless, entitled to fairness in the proceedings.

Respondent's argument at pages 9-10 also misses (or ignores) the points that (1) the fact Bechtel has a constitutional right to due process supports Bechtel's position that the question involved is an important one, and (2) the fact that Bechtel's right to fairness in the proceedings can only be protected by immediate collateral order appeal supports Bechtel's position that its rights are otherwise not vindicable.

Respondent's peremptory treatment of the issue of governmental action (Resp. 10) likewise ignores the bald fact that the administrative adjudicatory system as interpreted by the Secretary deprives Bechtel of inherent basic fairness in the proceedings and, if continued to be applied consistently, would undermine the Secretary's powers to efficiently manage adjudications. Indeed, the Secretary's argument to the contrary, (Resp. n.8), merely begs the question by arguing that the Secretary's regulations confer "ample authority to conduct full and fair hearings and to impose sanctions . . . for conduct that impinges on the integrity of his administrative proceedings." Respondent ignores, or misses, the point that the basis of the Secretary's rationale for his decision in the

case *sub judice* is inconsistent with, and undermines, these very same regulations. Respondent's argument gives short shrift to the ultimate threshold question regarding the sources and nature of the Secretary's powers.

Finally, Respondent's observation that there is no conflict among the circuits simply underscores the fact that the nature of the issues presented are such that, absent collateral order appeal, they are unlikely to be reached by the federal judiciary at all, let alone this Court. Indeed, respondent totally ignores the reasons presented by the petition (Pet. 6) for granting certiorari: (1) the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and (2) the Fifth Circuit has sanctioned such a departure by the Secretary from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power.

Thus, Respondent's brief resolves nothing and simply raises more questions, important questions, which merit this Court's attention. Respondent, rather than demonstrate the lack of significant and disputed questions, instead has buttressed the conclusion that the petition should be heard.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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